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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. MURL GARDNER SALMON, Defendant and Appellant.	H042341 (Santa Clara County Super. Ct. No. CC827450)

In 2011, defendant Murl Gardner Salmon began serving a "Three Strikes" sentence, an indeterminate term of 25 years to life in prison, following his conviction for a count of evading a peace officer in willful and wanton disregard for the safety of persons and property (Veh. Code, § 2800.2, subd. (a)). Following the passage of Proposition 36, the Three Strikes Reform Act, he filed a petition for resentencing under Penal Code section 1170.126.[1] Although he was eligible to be resentenced based on his current and past offenses, the trial court exercised its discretion to find that resentencing him would pose an "unreasonable risk of danger to public safety" as defined under section 1170.126, subdivision (f), and denied his petition. Defendant has appealed, arguing that the court should have applied the definition of an "unreasonable risk of danger to public safety" found in section 1170.18 (enacted by Proposition 47) and should have considered his offer to waive credit for time served when making its dangerousness

[1] Unspecified statutory references are to the Penal Code.

determination. For the reasons set forth below we find no merit in any of defendant's arguments and affirm the order denying his petition.

BACKGROUND

1. *Defendant's Third Strike*[2]

At approximately 11:30 p.m. on December 3, 2008, a San Jose Police Department officer observed defendant driving his car on city streets at a high rate of speed without his lights. The officer attempted to pull defendant over, but he quickly accelerated away. Defendant swerved between lanes and nearly collided with moving and parked cars, reaching speeds of over 100 miles per hour. The officer became concerned with public safety and terminated his pursuit.

Shortly thereafter, a second San Jose Police Department officer observed defendant speeding without his lights on and gave pursuit. Defendant was traveling at speeds over 100 miles per hour in a 35-mile-per-hour zone. He nearly collided with two cars and frequently changed lanes. He entered a freeway with the officer still in pursuit. Eventually, defendant stopped at an off-ramp. When responding to the officer's questions, defendant admitted that he had been drinking. Laboratory tests confirmed that defendant had a blood alcohol content of 0.23 percent.

On December 9, 2009, defendant pleaded no contest to a count of evading a peace officer in willful and wanton disregard for the safety of persons and property (Veh. Code, § 2800.2, subd. (a)) and pleaded guilty to two misdemeanor counts of driving while under the influence of alcohol (*id*., subds. (a), (b)). Defendant also admitted he had two prior strike convictions for robbery. (§§ 211, 212.5, subd. (c).) On January 21, 2011, he was

[2] We granted defendant's request to take judicial notice of his prior appeal, *People v. Salmon*, case No. H036664. We draw our facts from the unpublished opinion in the prior appeal, which is also part of the record in defendant's current appeal. (*People v. Salmon* (Jun. 27, 2012, H036664) [nonpub. opn.].)

sentenced to a term of 25 years to life in prison under the version of the three strikes law in effect at that time.[3]

2. *The Petition for Resentencing*

a. **Statutory Background**

In November 2012, California voters approved Proposition 36, the Three Strikes Reform Act of 2012 (hereafter the Reform Act). Prior to the passage of Proposition 36, the former three strikes law (§§ 667, subds. (b)-(i), 1170.12) mandated that a defendant who is convicted of two prior serious or violent felonies would be subject to a sentence of 25 years to life upon conviction of a third felony. The Reform Act amended the three strikes law. Now sections 1170.12, subdivision (c)(2)(C) and 667, subdivision (e)(2)(C) provide that a defendant with two or more strikes who is convicted of a felony that is neither serious nor violent must be sentenced as a second strike offender, unless certain exceptions apply. The Reform Act also added section 1170.126, which allows eligible inmates who are currently subject to 25-years-to-life sentences under the former three strikes law to petition the court for resentencing.

b. **Defendant's Petition and the People's Opposition**

On January 16, 2013, defendant filed a petition for resentencing under section 1170.126. The People opposed the petition, arguing that although defendant was eligible for resentencing under section 1170.126, resentencing him would pose an unreasonable risk of danger to public safety. The court held several hearings on defendant's petition. Before rendering its decision, the court considered the testimony of witnesses that testified at the hearing, defendant's own testimony, his criminal conviction history, and his record of rehabilitation while incarcerated. The focus of defendant's

[3] As we have already observed, defendant appealed his conviction in case No. H036664. On appeal, defendant's sole challenge was to the trial court's imposition of the booking fee under Government Code section 29550.1. We affirmed the judgment.

petition was on his prison disciplinary records, which included several incidents of violence, his alcoholism and drug addiction, and the support that he would receive if he were resentenced.

c. **Testimony at the Hearing**

i. *Dr. Rahn Minagawa*

Dr. Rahn Minagawa, a clinical forensic psychologist, testified as an expert on assessing alcohol and drug addiction and the use of alcohol and/or drugs as a risk factor for future recidivism. Dr. Minagawa's testimony focused on defendant's history of drug and alcohol abuse and the steps he had taken to address his addictions while incarcerated.

Dr. Minagawa had interviewed defendant in jail and had asked him psychological questions including a standardized test used to identify mental health conditions like depression, schizophrenia, alcohol abuse, substance abuse, antisocial behavior, and narcissistic behavior. Based on the psychological exam, Dr. Minagawa concluded that defendant was both an alcoholic and a drug addict. Defendant was "prone to act out impulsively often resulting in stormy and destructive consequences" when using alcohol or drugs.

Defendant had used methamphetamine at age 17 and had been drinking since the age of 10 or 11. Dr. Minagawa had asked defendant if he had used alcohol or drugs since his arrest in December 2008 for the underlying offense. Defendant had responded that he had not, and Dr. Minagawa explained that there were no documents to indicate that defendant had used drugs or alcohol since his commitment. Dr. Minagawa opined that defendant's ability to stop using drugs and alcohol in prison was "impressive." Defendant's use of alcohol and drugs at a young age, however, rendered it difficult for him to abstain from substance abuse.

Currently, defendant was incarcerated at a "Level IV" prison. Dr. Minagawa, relying on other experts who have worked in prison and with the prison population,

opined that a Level IV inmate faces consistently high levels of danger. According to Dr. Minagawa, the prison environment often requires inmates to behave in certain ways that are atypical of how they would behave if they were not in custody. During his time in prison, defendant had never completed a formal alcohol or drug program. Level IV prison facilities, however, did not offer those type of programs. On his own, defendant had previously completed a "Roadmap to Recovery" program and had finished 16 journals while he was in jail.

Looking at defendant's criminal history, Dr. Minagawa believed that defendant had either been addicted to alcohol or drugs, was using alcohol or drugs, or both, when he committed his past crimes.

After evaluating defendant, Dr. Minagawa believed that his judgment was good, his insight was fair, and his impulse control appeared to be adequate. One issue was defendant's uncertainty about whether he was going to reconcile with his wife, who was also an addict.

Dr. Minagawa believed that defendant would not pose an unreasonable risk of danger to public safety if resentenced. He opined that defendant had a "fair to good" chance to maintain his sobriety and to complete a program. Defendant had a current offer of acceptance into the "HealthRIGHT 360" program, an intensive inpatient program that would address his addiction issues. Defendant's mother supported his participation in the program.

ii. *Jeffrey Brownell*

Jeffrey Brownell was defendant's Alcoholics Anonymous sponsor, who had previously testified on defendant's behalf before he was sentenced for his third strike. Brownell had visited defendant in county jail on several occasions, spoken to him on the phone a few times, and had exchanged letters with him. Based on his communications

with defendant, Brownell believed that defendant was willing and open to change and was serious about his recovery from alcoholism and addiction.

iii. *Susan Salmon*

Susan Salmon (Susan), defendant's mother, testified in support for her son during the hearing. Susan explained that her husband (defendant's father) had an alcohol problem. Eventually, her husband became sober and participated in Alcoholics Anonymous before he passed away. Susan's father (defendant's grandfather) was also an alcoholic.

Susan asserted that she would support defendant financially and would pay for him to complete the HealthRIGHT360 program. Susan would also give defendant a job at the family business, a mortuary, if he successfully completed the program.

iv. *Defendant*

Defendant testified on his own behalf at the hearing. He acknowledged that he was an alcoholic and a drug addict and had come to the realization that he was an addict sometime in the summer of 2009. Defendant had not consumed alcohol or drugs since his arrest in 2008.

During his incarceration in prison, there were no formal drug or alcohol programs available to him. When he was previously in county jail, he participated in a Roadmap to Recovery journaling program. Defendant completed the same program again while he was in county jail awaiting the resentencing hearing under section 1170.126.

Defendant had a juvenile history and had previously spent time in juvenile facilities. He had never been involved in violent incidents as a juvenile.

Defendant's prior strikes for robbery did not involve weapons or violence. During those robberies, defendant handed notes to tellers demanding money.

Defendant was initially placed with the general population at prison, but was re-housed after prison authorities learned that he had received threats from Hispanic

factions of the prison population. He was, in addition, involved in three violent incidents during his current incarceration in prison as an adult that resulted in confinement in a security housing unit.

First, defendant battered an inmate with more advanced mental health issues. Defendant and Bealba (a fellow inmate), were walking laps and saw another inmate, who defendant recognized. Defendant approached the inmate and introduced himself. The inmate struck defendant and Bealba, so defendant retaliated and struck back.

Defendant had also been found to be in possession of a knife. Defendant explained that when he arrived at his cell, he was told by another inmate that there was a weapon stashed just outside the doorway to his cell. Defendant never touched the weapon and never saw the weapon. At some point, defendant was asked by other inmates if the weapon was still there. Defendant told his cellmate about the weapon and asked his cellmate to check to see if the knife was there. His cellmate confirmed the presence of the weapon. Shortly thereafter, defendant was charged with possession of a knife and his cellmate went into protective custody.

Lastly, defendant was involved in a prison riot. The riot occurred when groups of inmates attacked defendant and several other Caucasian inmates. Defendant said he fought back when he was attacked but was quickly overwhelmed. He was later charged with participating in the riot.

Earlier, when he was serving time for one of his robbery offenses in 2006, defendant had been involved with another race riot in prison.

According to defendant, it was difficult to get alcohol in prison. Drugs, however, were not too difficult to obtain.

Defendant had received several "political" tattoos as a juvenile, including a swastika on his forearm. Defendant regretted the tattoos that he had received. Defendant acknowledged that he "participated in protecting [himself] with other white inmates from

other racial groups, if need be" and denied participating in racial hostilities between different prison populations.

v. *James Esten*

James Esten testified as an expert in California Department of Corrections and Rehabilitation (CDCR) classifications, the CDCR disciplinary process, hearing procedures and time limitations, institutional levels, inmate custody levels, and inmate/staff relations. Esten had reviewed defendant's prison disciplinary record and had conducted interviews with defendant.

Level IV facilities, the facilities where defendant had been incarcerated during most of his time in prison, were for the most serious, egregious offenders. Programs addressing drugs and alcohol are not available to inmates, because these types of programs are not a priority. The facilities are often rife with racial tension.

First, Esten spoke of the 2006 prison riot that defendant participated in. Esten explained that this was a large riot, involving approximately 450 inmates. Typically, inmates are obligated to participate in these types of riots in support of their particular racial group. If they do not participate, they will suffer consequences from other inmates in the future.

Esten reviewed defendant's prison records and spoke with defendant about the incident involving battery on another inmate. Esten believed that defendant's statements about the battery were consistent with the reports. Some of the facts, such as the dialogue that defendant had with the inmate before the altercation occurred, could not be readily verified. Officers intervened only after the fight broke out, so they did not see how the fight began. Esten opined that the battery should not have occurred, because the inmate who was involved in the battery should not have been housed in that area at the time because of his mental health issues.

Esten also reviewed the records pertaining to the incident where defendant was found to be in possession of a knife. The knife was found in the door frame of the cell, which was technically outside of the physical cell. Defendant's version of the events was consistent with the official reports.

In regard to the incident where defendant participated in a riot, Esten reviewed the records and believed that although defendant was adjudicated as participating in the riot, the reports actually show that defendant was a victim. Esten opined that, at most, defendant should have been charged with disobeying an order when he did not prone out onto the ground as ordered by correctional officers.

d. **The Court's Decision**

After considering the briefing submitted by the parties, the testimony provided at the hearing, and defendant's disciplinary reports and other evidence, the trial court denied defendant's petition for resentencing.

The court noted that defendant's prior strike offenses were not violent. The court, however, opined that the most recent offense involved a police chase that lasted a significant amount of time through city streets and had occurred when he had been out of custody for approximately five months and was still a parolee. Defendant also had a lengthy history of incarceration, beginning in 1994.

The court further acknowledged defendant's disciplinary records from prison, and opined that it did not "think too much of them," commenting on the prison riots. The court also acknowledged that it had appeared that defendant had abstained from alcohol and drugs during his period of incarceration.

Considering the reports submitted by Dr. Minagawa and Esten, both of whom acknowledged defendant's problem with alcoholism and addiction, the court focused its concern on defendant's risk of succumbing to his addictions outside of the structured environment of prison. Dr. Minagawa gave defendant only a "fair to good" chance of

maintaining his sobriety. Based on this, the court found that defendant posed an unreasonable risk of danger to public safety and denied the petition for resentencing.

The court remarked that defendant had offered to waive credit for time served prior to the hearing. The court concluded that defendant's offer should not be part of its consideration at the time. The court noted that the issue of waiver of custody credit was a "process that the court has, as far as the court is concerned, little or no control over." The court also stated that it believed that a sentence "somewhere in the neighborhood of 20 to 15 years at the outset would have been within the realm of reason." The court also stated that it did not believe that there was anything the court could do to give defendant "a measure of determinacy, any determinant sentence that would have been perhaps more appropriate."

DISCUSSION

Defendant raises two arguments pertaining to the trial court's denial of his petition for resentencing. First, he argues that the trial court erred when it concluded that Proposition 47's definition of an unreasonable risk of danger to public safety (§ 1170.18, subd. (c)) did not apply to petitions for resenting under section 1170.126. Next, he argues that the trial court erred when it failed to take into consideration his offer to waive credit for time served.[4] We first address defendant's claim regarding the application of Proposition 47's definition to resentencing petitions brought under section 1170.126.

[4] In his opening brief, defendant expresses that he is not directly challenging the trial court's finding that he posed an unreasonable risk of danger to public safety, because he believes that this "determination is within the discretion of the trial court and can be challenged successfully in the context of a decision related to sentencing only if the court's decision exceeds the bounds of reason or is arbitrary or irrational." Based on defendant's briefs, it appears that he concedes that, based on the standards set forth in section 1170.126, the trial court's decision to find him an unreasonable risk of danger to public safety (under the definition set forth in the Reform Act), was not an abuse of discretion.

1. *Proposition 47's Definition of an Unreasonable Risk of Danger to Public Safety*

a. **Background**

In November 2012, voters enacted section 1170.126 as part of the Reform Act. (*People v. Yearwood* (2013) 213 Cal.App.4th 161, 167.) As discussed above, section 1170.126, subdivision (f) specifies that a petitioner shall be resentenced unless "the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." Section 1170.126 does not contain a definition of the phrase "unreasonable risk of danger to public safety," but does include a nonexclusive list of criteria a court may consider when making a determination of dangerousness. (§ 1170.126, subd. (g).)

Two years later in November 2014, voters enacted Proposition 47, the "Safe Neighborhoods and Schools Act." The Legislative Analyst described Proposition 47 as having three main functions: reducing penalties for certain offenders convicted of nonserious and nonviolent property and drug crimes, allowing certain offenders previously convicted of such crimes to apply for reduced sentences, and requiring state savings resulting from the measure be spent to support various services.[5] (Voter Information Guide, Gen. Elec. (Nov. 4, 2014) analysis of Prop. 47 by Legis. Analyst, p. 35.)

Proposition 47 does not mention the Reform Act. It did, however, establish procedures for certain offenders to apply for a reduced sentence. Section 1170.18, subdivision (a) provides that defendants convicted of certain nonserious, nonviolent property and drug felonies can file a petition requesting resentencing. A court that receives the petition shall resentence the petitioner "unless the court, in its discretion,

[5] We take judicial notice of the text of Proposition 47 and its accompanying ballot materials. (Evid. Code, §§ 452, 459.)

determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." (§ 1170.18, subd. (b).)

Pertinent here, section 1170.18, subdivision (c) states: "As used throughout this Code, 'unreasonable risk of danger to public safety' means an unreasonable risk that the petitioner will commit a new violent felony within the meaning of clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667."

b. **Analysis**

Defendant argues the narrow definition of an unreasonable risk of danger to public safety set forth in section 1170.18, subdivision (c), enacted by Proposition 47, applies to the phrase as used in section 1170.126, enacted by the Reform Act.[6] We disagree.

"We recognize the basic principle of statutory and constitutional construction which mandates that courts, in construing a measure, not undertake to rewrite its unambiguous language. [Citation.] That rule is not applied, however, when it appears clear that a word has been erroneously used, and a judicial correction will best carry out the intent of the adopting body." (*People v. Skinner* (1985) 39 Cal.3d 765, 775.) Whether the use of a word is the result of a drafting error "can only be determined by reference to the purpose of the section and the intent of the electorate in adopting it." (*Id.* at p. 776.)

We hold that if we examine the intent of the electorate in passing Proposition 47, we are compelled to conclude that the word "Code" in section 1170.18, subdivision (c) was erroneously used in place of the word "Act" to refer to the Safe Neighborhoods and Schools Act (Proposition 47). There is nothing to indicate that in passing Proposition 47 the electorate intended to modify or change the Reform Act in any way.

[6] This issue is currently pending review in the California Supreme Court in *People v. Valencia* (2014) 232 Cal.App.4th 514 (review granted Feb. 18, 2015, S223825).

None of the materials accompanying Proposition 47 contain any reference to the Reform Act. For example, the Voter Information Guide to Proposition 47 states that "[t]his measure reduces penalties for certain offenders convicted of nonserious and nonviolent property and drug crimes. The measure also allows certain offenders who have been previously convicted of such crimes to apply for reduced sentences. In addition, the measure requires any state savings that result from the measure be spent to support truancy (unexcused absences) prevention, mental health and substance abuse treatment, and victim services." (Voter Information Guide, Gen. Elec., *supra*, analysis of Prop. 47 by Legis. Analyst, p. 35.) The Legislative Analyst then detailed the changes that would be made if Proposition 47 was passed. None of these changes included redefining the meaning of the phrase "unreasonable risk of danger to public safety" in the Reform Act.

In fact, there was no mention of reforming the three strikes law in any of the official ballot materials accompanying Proposition 47. Nothing in the official ballot materials reflects that Proposition 47 was intended to have an impact on offenders who did not commit the specified nonserious, nonviolent property or drug crimes described in Proposition 47. The ballot materials indicate that the thrust of the initiative was to reduce specific, less serious felonies to misdemeanors. Furthermore, the ballot materials emphasize that the resentencing provisions set forth in Proposition 47 were limited to those individuals serving sentences for the specified nonserious, nonviolent drug or property crimes.

We agree that "[b]allot arguments are not legal briefs and are not expected to cite every case the proposition may affect." (*Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 237.) Additionally, the official summary prepared by the Legislative Analyst need not describe every way the enacted measure may change the law. "The analysis may contain background information, including the

effect of the measure on existing law and the effect of enacted legislation which will become effective if the measure is adopted, and shall generally set forth in an impartial manner the information the average voter needs to adequately understand the measure." (Elec. Code, § 9087, subd. (b).)

Here, the ballot summary is completely devoid of any mention of the Reform Act or the three strikes law. It strains credulity to conclude that the Legislative Analyst failed to mention Proposition 47's purported effect on the Reform Act because it believed it was likely to matter less to voters, or that it was an auxiliary issue. If in fact one of the purposes of Proposition 47 was to provide a new definition of an "unreasonable risk of danger to public safety" in the Reform Act—essentially rewriting the standard by which three strikes resentencing petitions are heard and decided by the trial court—that should certainly be "information the average voter needs to adequately understand the measure." (Elec. Code, § 9087, subd. (b).)

There are also practical reasons for us to conclude that Proposition 47 contains a drafting error. For example, the Reform Act requires that petitions for resentencing be brought within two years of its passage unless there is good cause for filing a late petition. (§ 1170.126, subd. (b).) By the time Proposition 47 took effect, the two-year period for filing a petition under section 1170.126 was nearly over. It is illogical to conclude that Proposition 47 was meant to modify the Reform Act when most of the three strike resentencing petitions were already adjudicated and decided by that time.

The language of section 1170.18 also lends support to our conclusion. Section 1170.18 specifically provides that, "Nothing in this and related sections is intended to diminish or abrogate the finality of judgments in any case not falling within the purview of this act." (§ 1170.18, subd. (n).) Applying the definition of "unreasonable risk of danger to public safety" from section 1170.18 to section 1170.126,

would undoubtedly diminish the finality of those three strikes judgments that do not involve a nonserious, nonviolent property or drug crime.

Lastly, our conclusion does not render the phrase "[a]s used throughout this Code" in section 1170.18, subdivision (c) meaningless surplusage. The general rule is that "statutes are to be construed to give meaningful effect to all of their provisions, and to avoid rendering any language superfluous." (*Planned Parenthood Affiliates v. Van de Kamp* (1986) 181 Cal.App.3d 245, 270.) Based on the foregoing, we conclude that section 1170.18, subdivision (c) contains a drafting error that must be judicially corrected. Under a corrected reading of the statute, we find that the word "Code" must be read as "Act." Therefore, the phrase would read "[a]s used throughout this Act" meaning Proposition 47.

2. *Consideration of Defendant's Offer to Waive Credit for Time Served*

a. **Overview of the Reform Act**

Prior to the passage of Proposition 36, the former Three Strikes law (§§ 667, subds. (b)-(i), 1170.12) mandated that a defendant who is convicted of two prior serious or violent felonies would be subject to a sentence of 25 years to life upon conviction of a third felony. The Reform Act amended the three strikes law. Now, section 1170.12, subdivision (c)(2)(C) and section 667, subdivision (e)(2)(C) provide that a defendant with two or more strikes who is convicted of a felony that is neither serious nor violent must be sentenced as a second strike offender, unless certain exceptions apply.

The Reform Act also added section 1170.126, which allows eligible inmates who are currently subject to 25-years-to-life sentences under the former three strikes law to petition the court for resentencing. "Section 1170.126, subdivisions (a) and (b), broadly describe who is eligible to file a petition and to be resentenced. Subdivision (a) of section 1170.126 states: 'The resentencing provisions under this section and related statutes *are intended to apply exclusively* to persons presently serving an indeterminate

term of imprisonment pursuant to paragraph (2) of subdivision (e) of Section 667 or paragraph (2) of subdivision (c) of Section 1170.12, *whose sentence under this act would not have been an indeterminate life sentence*.' " (*Teal v. Superior Court* (2014) 60 Cal.4th 595, 598.) "Subdivision (b) of section 1170.126 states: 'Any person serving an indeterminate term of life imprisonment imposed pursuant to paragraph (2) of subdivision (e) of Section 667 or paragraph (2) of subdivision (c) of Section 1170.12 upon conviction, whether by trial or plea, of a felony or felonies *that are not defined as serious and/or violent felonies* by subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7, *may file a petition for a recall of sentence*. . . .' " (*Id*. at p. 599.)

An eligible prisoner "shall be resentenced" as a second strike offender unless the court determines that resentencing him or her "would pose an unreasonable risk of danger to public safety." (§ 1170.126, subd. (f).) In exercising its discretion under section 1170.126, subdivision (f), the trial court may consider various factors including the petitioner's criminal conviction history, disciplinary record and record of rehabilitation while incarcerated, and "[a]ny other evidence the court . . . determines to be relevant . . . ." (*Id*., subd. (g)(3).)

b. **Defendant's Arguments**

Defendant's current offense is for a violation of Vehicle Code section 2800.2, and if he is resentenced as a second strike offender he would be subject to a maximum sentence of six years (twice the maximum term of three years). (Veh. Code, § 2800.2, subd. (a); §§ 18, 667, subd. (e)(1), 1170.12, subd (c)(1).) As a second-strike offender, defendant would be eligible to receive conduct credit during his imprisonment at a rate of 20 percent. (§§ 667, subd. (c)(5), 1170.12, subd. (a)(5).) Due to his disciplinary record, defendant had lost 160 days of credit due to the incident involving possession of a knife and 90 days of credits each for the incidents involving inmate battery and the prison riot. Defendant claims that if he had been resentenced as a second-strike offender at the time

of the resentencing hearing in March 2015, he would have been immediately eligible for release.

If, however, he had waived credit for all time served up until the sentencing hearing (and any future conduct credit), and the trial court sentenced him to a six-year prison term, defendant would not have been eligible for release for another six years—until 2021 (six years after 2015). Doing so would have resulted in a prison term of approximately 12 years (defendant was arrested in 2008, pleaded no contest in 2009, and was sentenced in 2011).

Prior to the resentencing hearing, defendant offered to waive credit for *all* time already served in this case and any future conduct credit. During the sentencing hearing, the court stated that it believed that it could not consider defendant's offer for purposes of resentencing under section 1170.126. Defendant now argues that this was error and demonstrates that the court failed to exercise its discretion.

We find that based on the facts of this case, we need not decide whether the trial court erred when it declined to consider defendant's offer to waive entitlement to past conduct and custody credit and future conduct credit. As the People note, defendant's arguments fail because he does not demonstrate prejudice.

" 'Defendants are entitled to sentencing decisions made in the exercise of the "informed discretion" of the sentencing court. [Citations.] A court which is unaware of the scope of its discretionary powers can no more exercise that "informed decision" than one whose sentence is or may have been based on misinformation regarding a material aspect of a defendant's record.' [Citation.] In such circumstances, we have held that the appropriate remedy is to remand for resentencing unless the record 'clearly indicate[s]' that the trial court would have reached the same conclusion 'even if it had been aware that it had such discretion.' " (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391.)

Here defendant argues that the trial court clearly failed to understand its discretion, and it is not clear whether the court would have reached the same conclusion if it had been aware that it could consider his offer to waive credit for time served. Defendant bases his argument on the trial court's following statements when discussing defendant's offer to waive his credits: "There was no way in this case for the court to come to that type of ballpark process. There's nothing that the court can do to give [defendant] a measure of determinacy, any determinant sentence that would have been perhaps more appropriate." Defendant argues that there *was* a way for the court to get to a "ballpark" reasonable sentence, and that was by allowing him to waive credit for all time served.

During the sentencing hearing, however, the trial court expressly stated that "a sentence somewhere in the neighborhood of 20 to 15 years at the outset would have been within the realm of reason." In other words, the trial court specifically stated that it believed a sentence between 15 and 20 years was appropriate. Defendant's offer to waive past and future credit for time served would have rendered his sentence the equivalent of approximately 12 years in prison (six years after resentencing as a second strike offender coupled with the approximately six years he had already spent incarcerated), which is significantly short of the 15 to 20 years deemed reasonable by the trial court. We therefore find that, even assuming the trial court should have considered defendant's offer, the record clearly indicates that the trial court would have reached the same conclusion and would have denied defendant's petition for resentencing.

DISPOSITION

The order denying the petition for resentencing is affirmed.

Premo, J.

I CONCUR:

Grover, J.

People v. Salmon
H042341

RUSHING, P.J., Dissenting

I respectfully dissent. I have written on this subject extensively, though the only opinion I am at liberty to cite is *People v. Cordova* (2016) 248 Cal.App.4th 543, review granted August 31, 2016, S236179 (*Cordova*); see Cal. Rules of Court, rule 8.1105(e); cf. former Cal. Rules of Court, rules 8.1105(e)(1), 8.1115(a).) I believe that decision adequately addresses most of the points relied upon here by the majority. I offer a few additional comments, however, in response to what I perceive as relatively new points.

All legal controversies may be viewed as contests between competing narratives. Here, according to the majority, when the drafters of Proposition 47 drew up Penal Code section 1170.18, they *accidentally* declared its definition of dangerousness applicable "throughout this Code." (*Id*., subd. (c) (§ 1170.18(c)).) What they really meant to say, according to this narrative, was "in this act." I find this narrative unsound on both legal and factual grounds. Indeed, I find it implausible on its face because it supposes that the drafters not only chose the wrong noun; they also chose a preposition ("throughout") that assumes multiple occurrences—a further malapropism, since Proposition 47 uses the defined phrase only once outside the definition itself.

My own narrative, which I believe is firmly grounded in historical fact and settled law, proceeds as follows: The drafters of Proposition 47 were able lawyers and law students interested in criminal justice reform.[1] In drafting that measure, they were well

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[1] One of the official proponents of Proposition 47 was George Gascón, the San Francisco District Attorney. (George Gascón, Letter to Office of the Attorney General, Dec. 14, 2013, available at <https://oag.ca.gov/system/files/initiatives/pdfs/13-0060%20%2813-0060%20%28Neighborhood%20and%20School%20Funding%29%29.pdf?> (as of Oct. 18, 2016); Ballot Pamp., General Elec. (Nov. 4, 2014), argument in favor of Prop. 47, p. 38.) Another article identifies Lenore Anderson, executive director of Californians for Safety and Justice, as an author. (Chang, et al., Unintended consequences of Prop. 47 pose challenge for criminal justice system, L.A. Times (Nov. 6, 2015), available at <http://www.latimes.com/local/crime/la-me-prop47-anniversary-20151106-story.html> (as of Oct. 18, 2016).) According to that organization's website, she was formerly "Chief of Policy and Chief of the Alternative Programs Division at the

aware of Proposition 36 and with how its resentencing provisions had fared in the courts. Their adoption of a more restrictive test of dangerousness than the one provided in the earlier measure implies a perception that the earlier test had granted judges too much latitude, resulting in too many denials of relief based on marginal, equivocal, or generic evidence of dangerousness.[2] Such denials thwarted the common purpose of both measures, which was to correct for some of the excessive incarceration—and excessive public expense—produced by past "tough-on-crime" measures.[3] There can be no doubt

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San Francisco District Attorney's Office," where among other things she "crafted local and state legislation." (Californians for Safety and Justice, Our Staff, <http://www.safeandjust.org/About-Us/ourteam> (as of Oct. 18, 2016).)

It also appears that the Stanford Justice Advocacy Project (SJAP)—an officially recognized student organization at Stanford Law School—contributed to the drafting of the measure. (Ho, Prop. 47: Deep split over law reducing 6 felonies to misdemeanors—S.F. Gate (Nov. 5, 2015), available at <http://www.sfgate.com/crime/article/S-F-district-attorney-defends-Prop-47-which-6614091.php> (as of Oct. 18, 2016); Romano, et al., Proposition 47 Progress Report: Year One Implementation (Oct. 2015), p. 1, available at <https://www-cdn.law.stanford.edu/wp-content/uploads/2015/10/Prop-47-report.pdf> (as of Oct. 18, 2016). [according to its Director, SJAP "was involved in the drafting of Proposition 47 . . . ."]; Organizations Archive – Stanford Law School, <https://law.stanford.edu/organizations/?first_letter=J&page=1> (as of Oct. 18, 2016) [guide to student organizations on school website].)

[2] This case appears to be yet another example of this syndrome. One need only read the majority's own summary of the evidence before the trial court to conclude that the evidence of potential dangerousness was equivocal at best. Defendant's current offense—driving at 100 miles per hour on city streets—was certainly more dangerous than many of those targeted by Proposition 36. But it was inextricably linked to his alcohol abuse, and there were strong indications that he had thus far succeeded, and would continue to succeed if released, in his efforts to recover from his addictions.

[3] Specifically, Proposition 36 restricted the application of the "Three Strikes" law, while Proposition 47 reduced many offenses from felonies (or "wobblers") to straight misdemeanors. Both measures were argued to the voters largely on the basis of their fiscal benefits. In this regard, it bears noting that as of this writing, about 18 years remain of defendant's 25-to-life sentence. Using the low-end estimate for the annual costs of incarceration, today's decision could cost taxpayers upwards of $900,000. (See *Cordova, supra,* 248 Cal.App.4th at pp. 574-575, review granted.)

that the drafters intended to avoid repeating the mistake of granting trial judges more latitude than necessary to prevent the release of truly dangerous prisoners. And there was no reason for them to merely learn from this mistake when Proposition 47 provided an opportunity to *correct* it as well. To carry out this remedial intention, they (1) copied the operative language from Proposition 36; (2) assigned a new and considerably narrower *meaning* to that language, and (3) declared this definition applicable "throughout this Code." Since Proposition 36 was the only other place where the defined language appeared, this phrase unmistakably conveyed their intention that the new definition would apply to petitions heard under that measure as well as the new measure.

In short, whatever the drafters' choice of language may have been, it was not a drafting error. There is every reason to believe that they knew exactly what they were doing.[4] The majority resorts to the notion of a drafting error not because that concept fits

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[4] Ironically, Proposition 47 does contain a real mistake in drafting—an omitted "as" in a clause stating that resentencing shall take place "pursuant to Sections 11350, 11357, or 11377 of the Health and Safety Code, or Section 459.5, 473, 476a, 490.2, 496, or 666 of the Penal Code, [as] those sections have been amended or added by this act." (Pen. Code, § 1170.18, subd. (b).) This is the sort of gaffe that courts are empowered to correct under the rubric of "drafting error." (See, e.g., *People v. Skinner* (1985) 39 Cal.3d 765, 775 (cited by majority, maj. opn. at p. 12 [use of the "and" when "or" was intended; *Szold v. Medical Bd. of California* (2005) 127 Cal.App.4th 591 ["or" replaced by "of" as bill progressed]; *People v. Superior Court (Blanquel)* (2000) 85 Cal.App.4th 768, 771 [accidental omission of cross-references to predecessor statutes in course of complex code reorganization]; *People v. Alexander* (1986) 178 Cal.App.3d 1250, 1265 [inadvertent temporary omission of sanctions for selling PCP "in the 'hurry and confusion' of major legislative activity involving changes in over 100 statutes"]; *In re Chavez* (2004) 114 Cal.App.4th 989, 994, 998 [correction of earlier sentencing statute operated retroactively to defendant's benefit, where corrected statute had been result of attempt to conform to federal law on tangentially related subject matter]; cf. *In re Gabriel G.* (2005) 134 Cal.App.4th 1428, 1436 [refusing to deny effect to statutory language as "inadvertent" merely because it produced consequences Legislature might not have intended]; *People v. Garcia* (1999) 21 Cal.4th 1, 4, 6 [refusing to base construction of provision of Three Strikes law on posited " 'drafting oversight' " or " 'drafting error' " as manifested in a supposed discrepancy between two otherwise redundant provisions of the Three Strikes law; *id.* at p. 6, italics added ["Although we may properly decide upon such

the facts, but because there is *no* existing rule of law that fits these facts and that can justify the judicial unwillingness—which, sadly, is not confined to this court—to give effect to this statute. The notion of a "drafting error" is just one of several deficient rationales that have been adopted by this and other courts to clothe their reluctance to apply these measures according to their plain meanings. As discussed below, this reluctance was not shared by the opponents of Proposition 47, who pounced on the proposed modification of Proposition 36's dangerousness standard as a prime reason to vote against Proposition 47. (See *Cordova, supra,* 248 Cal.App.4th at pp. 560-562, review granted.) And they succeeded in publicizing this view even though they elected not to include it among their ballot arguments. (*Id.* at pp. 562-564.)

The real factual premise on which the majority narrative rests is not that the *drafters* misspoke but that the Legislative Analyst, who is charged with the responsibility of drafting the official ballot summary, omitted any mention of an effect on Proposition 36 petitions from the official Proposition 47 ballot materials. Responding to points I have made elsewhere, the majority declares that the meaning of this provision was "certainly . . . 'information the average voter need[ed] to adequately understand the measure.' (Elec. Code, § 9087, subd. (b).)" (Maj. opn. at p. 14.) The implication is that by omitting the measure's effect from on Proposition 36 from the official ballot summary, the office of the Legislative Analyst failed to do its job. But we are not here to pass judgment on the Legislative Analyst's conduct. We are here to determine the effect of statutory language. The majority's treatment would shift the judicial focus from the language adopted by voters to the language in which it was *described to them* by the Legislative Analyst. The underlying assumption is that voters know only what they are explicitly told in the ballot pamphlet. The law is to the contrary. (See *Cordova*, *supra*,

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a construction or reformation when *compelled by necessity* and *supported by firm evidence of the drafters' true intent* [citation], we should not do so when the statute is reasonably susceptible to an interpretation that harmonizes all its parts without disregarding or altering any of them."].)

248 Cal.App.4th at pp. 555, review granted.)

Further, I doubt that the Legislative Analyst can be faulted for omitting this effect from the official summary. The real requirement, which the majority only partially quotes, is this: "The analysis shall be written in clear and *concise* terms, so as to be *easily understood by the average voter*, and shall *avoid the use of technical terms* wherever possible. The analysis *may* contain *background information, including the effect of the measure on existing law* and the effect of enacted legislation which will become effective if the measure is adopted, and shall *generally* set forth in an impartial manner the information the *average voter needs to adequately understand the measure*." (Elec. Code, § 9087, subd. (b), italics added.)

Obviously the preparer of such a summary must be allowed considerable latitude in determining what to include. (See *Brennan v. Board of Supervisors* (1981) 125 Cal.App.3d 87, 96 ["Faced with the difficult task of simplifying a complex proposal, the Committee drafted a summary which, if not all-encompassing, at least briefly described its major subjects."]; *ibid*. ["[T]he Committee's ballot summary, while technically imprecise, omitted only auxilliary [*sic*] or subsidiary matters, fairly represented the measure and thus was in substantial compliance with the law."].) The Legislative Analyst is thus required only to make a rational judgment about what effects are *most likely to matter to voters*, and to describe them in a fair and intelligible way. I find it far from obvious that the effect on Proposition 36 petitions was likely to matter to a great many voters. The retroactive provisions of both Propositions 36 and 47 may be viewed in their entirety as what the majority calls an "auxiliary" issue. (Maj. opn. at p. 14.) The main thrust of both measures was to modify sentencing laws so that felonies not classified as serious or dangerous would no longer trigger a life sentence (Proposition 36) and so that a particular class of offenses would no longer produce felony convictions (Proposition 47). The resentencing provisions were purely remedial, i.e., an attempt to undo some of the excessive (and expensive) incarceration already occasioned by the old regime. There is no reason to imagine voters would have been significantly concerned

with the precise standard by which courts would decide whether persons already in prison would be disqualified from resentencing on grounds of excessive dangerousness. Certainly there is no reason to think it would have moved a significant number of otherwise supportive citizens to vote no. After all, there was no question that the narrow standard of dangerousness with which we are concerned would govern petitions under Proposition 47, and this fact did not dissuade a majority of voters from supporting that measure. I see no reason to think that a significant number of voters would have changed their minds if the ballot pamphlet had explicitly told them that this same standard would now be applied to Proposition 36 petitions. Given the limited number of persons actually affected by this provision, it seems entirely likely that the Analyst failed to mention it not out of ignorance or neglect but because that office expected it to matter less to voters than other features of the measure.

I also find it highly significant in this context that the official opponents of Proposition 47 failed to mention this effect in their ballot arguments. If it were the smoking gun the majority portrays it to be, would not the opponents have highlighted it? Certainly they were aware of it: as we noted in *Cordova*, *supra*, 248 Cal.App.4th at pages 560-564, review granted, they made every effort to bring this issue to the public's attention—every effort, that is, except the use of their own precious space in the ballot pamphlet. The majority offers no response to this point because there is no response. The fact is that Proposition 47 was vigorously tried in the court of public opinion on grounds including its effect on Proposition 36, and voters found it worthy of passage. (See *id.* at pp. 598-602, appendix.) It is not for any court to declare, even if the court so believes, that voters lacked the intellectual wherewithal or attentiveness to understand what they were voting for. Our system of government requires us to presume, as indeed the precedents direct us to presume, the contrary. (*Id.* at pp. 555.)

In the end it is impossible to know how many voters were subjectively aware of Proposition 47's remedial effect on Proposition 36 when they cast their ballots. But that is not a question with which this court should or can properly concern itself. The

language the voters enacted into law has an unmistakable meaning. In the absence of some truly compelling reason to depart from that meaning—a reason respecting, among other things, the constitutional barrier against judicial encroachment upon the legislative power—it is simply not within our province to do other than apply the statute as it is written. Because the presumption against retroactivity is no impediment to its application here (see *Cordova*, *supra*, 248 Cal.App.4th at pp. 569-578, review granted), we should reverse with instructions to reconsider appellant's petition in light of the dangerousness standard prescribed by Penal Code section 1170.18(c).

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RUSHING, P.J.